

**NORTH DAKOTA DEPARTMENT OF HUMAN SERVICES
BISMARCK, NORTH DAKOTA
May 12, 2014**

IM 5206

TO: County Social Service Directors
County Eligibility Workers
Economic Assistance Policy Regional Representatives
Economic Assistance Policy Quality Control Reviewers

FROM: Julie Schwab, Director, Medical Services

SUBJECT: Changes Affecting Aged, Blind, Disabled Cases

PROGRAMS: Medicaid

EFFECTIVE: April 1, 2014

RETENTION: Until superseded

SECTIONS: **510-05-70-30 Excluded Assets**
 510-05-70-40 Contractual Rights to Receive Money
 Payments
 510-05-70-60 Valuation of Assets
 510-05-80-15 Penalty Periods
 510-05-80-37 Payment for Services to an Attorney-
 in-Fact

The following rule changes affect the Aged, Blind and Disabled (non-MAGI) households as of April 1, 2014. Cases processed on or after April 1, 2014 until this was issued may remain processed as-is.

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- 1. Language is added to subsection 22 of the Excluded Assets section to clarify that privately held IRA's, Roth IRA's and 401(a) plans may be excluded as assets (but the payments are still countable income),**
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Excluded Assets 510-05-70-30

The following types of property interests will be excluded in determining if the available assets of an applicant or recipient exceed asset limits:

22. Funds held in ~~employer-sponsored~~ retirement plans that are ~~meet the~~ qualified retirement plans and meet the qualified retirement criteria established by the Internal Revenue Service (IRS), 26 U.S.C. ~~but not~~ private retirement plans. ~~An Employer-sponsored retirement plan is a benefit plan that an employer offers for the benefit of his/her employees at no or a relatively low cost to the employees.~~ These include:

- SEP-IRA (Simplified employee pension) plans
- Employer or employee association retirement accounts
- Employer simple retirement accounts
- 401(k) retirement plans (which include independent (sole proprietorship) plans)
- 403(b) retirement plans
- 457 retirement plans
- 401(a) Employer-sponsored money-purchased retirement plan
- Individual Retirement Plans (IRA's)
- Roth Individual Retirement Plans (IRA's)

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2. **The definition of 'judgment proof' has been changed in the Contractual Rights to Receive Money Payments section to be inline with current law:**

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Contractual Rights to Receive Money Payments 510-05-70-40

3. Contract values.

- a. The value of a contract in which payments are current is equal to the total of all outstanding payments of principal required to be made by the contract, unless evidence is furnished that establishes a lower value.
- b. The value of a contract in which payments are not current is an amount equal to the current fair market value of the property subject to the contract. If the contract is not secured by property, the value of the contract is the total of all outstanding payments of principal and past due interest required to be made by the contract.
- c. In situations where the contractual right to receive money payments is not collectable and is not secured, the debt has no collectable value, and thus no countable asset value.

An applicant or recipient can establish that a note has no collectable value if:

- i. The debtor is judgment proof. A debtor is judgment proof when money judgments have been secured, an execution has been served against the debtor which has been returned as wholly unsatisfied and the debtor's affidavit and claims for exemptions exempt all of the debtor's property; or
- ii. The applicant or recipient verifies the debt is uncollectible due to a statute of limitations. A satisfactory verification includes an attorney's letter identifying the statute and facts that make a debt uncollectible due to a statute of limitations.

Applicants and recipients should be encouraged not to forgive debts that have been determined to be uncollectible. Such debts could have a future value if the debtor ever accrues assets. At each annual review, determine whether the judgments are still on file or whether the debtor has any change in assets.

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3. **In the Valuation of Assets section, the method of valuing mineral rights that have been sold or transferred has been changed. Also the period over which we consider lease payments was increased from 36 to 60 months. These changes keep the values more realistic for this period in ND.**

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Valuation of Assets 510-05-70-60

3. Real property:
 - a. With respect to mineral interests:
 - i. If determining current value (for sale or pending transfer):
 - (1) Fair market value is the value established by good faith effort to sell. The best offer received establishes the value.
 - (2) A good faith effort to sell means offering the mineral

interests to at least three companies purchasing mineral rights in the area, or by offering for bids through public advertisement.

- ii. If determining a previous value for mineral rights sold or transferred in the past, fair market value is:
 - (1) If producing, the value is an amount equal to any lease income received after the transfer plus three times the annual royalty income.
 - (a) Based on actual royalty income from the ~~36~~ 60 months following the transfer; or
 - (b) If ~~36~~ 60 months have not yet passed, based on actual royalty income for the months that have already passed, and an estimate for the remainder of the ~~36~~ 60 month period.

Example: John gave his son Jude 100 net mineral acres in western North Dakota for Christmas in December 2011. In June of 2012, Jude leased out the acres for \$75,000. The acres had 2 high-production wells that have been paying royalties since February, 2008. Royalties paid to date are:
2008 \$50,000; 2009 -\$75,000; 2010- \$100,000;
2011-\$125,000; 2012 - \$150,000; 2013 --
\$200,000.

John is applying for long-term care coverage under Medicaid in January 2014. The value of the acres transferred will be the \$75,000 lease payment, plus \$390,000 (3 times \$130,000 (\$650,000 divided by 5 years)). The amount of the disqualifying transfer would be \$465,000.

- (2) If not producing, but mineral rights are leased, two times the lease amount (based on the actual lease and not the yearly lease amount) that was in place at the time of the transfer.

Example: John Oilslick leased his mineral acres in 2008 for \$3000. He transferred his mineral rights to his adult children in January 2010. The children have a new lease on these

acres effective January 2011 for \$10,000. The disqualifying transfer is equal to two times the \$3,000 lease that was in place at the time of the transfer.

- (3) If not leased, the greater of two times the estimated lease amount, or the potential sale value of the mineral rights, as determined by a geologist, mineral broker, or mineral appraiser at the time of the transfer, whichever is greater.

Example: Don Goldmine had his mineral acres valued at \$50,000 in 2010 when he transferred them to his children. Today those minerals are valued at \$20,000. The amount of the disqualifying transfer would be \$50,000, the value at the time of the transfer.

- iii. In determining current or previous value, an applicant or recipient may provide persuasive evidence that the value established using the above process is not accurate. Likewise, if an established value is questionable, the Department may require additional evidence be provided to establish estimated fair market value.

Example: Mary Golddigger leased her mineral acres in June 2008 for \$5,000 under a 3-year lease. Two months before the lease expired -- April 2011, she transferred those acres to her daughter, Nugget Golddigger. Nugget then leased those acres for \$20,000. In this situation, at the time of transfer, Mary probably reasonably would be aware of the lease renewal amounts. Even if she didn't know, it is likely that the value was closer to the \$20,000 than \$5,000. The eligibility worker must get information of the estimated value as of the date of the transfer. The value of the disqualifying transfer at 2 X the newer lease amount of \$20,000 equals \$40,000.

- b. With respect to agricultural lands: appraisers, real estate agents dealing in the area, loan officers in local agricultural lending institutions, and other persons known to be knowledgeable of land

sales in the area in which the lands are located, but not the "true and full" value from tax records.

- c. With respect to real property other than mineral interests and agricultural lands: market value or "true and full" value from tax records, whichever represents a reasonable approximation of market value; real estate agents dealing in the area; and loan officers in local lending institutions. If a valuation from a source offered by the applicant or recipient is greatly different from the true and full value established by tax records, an explanation for the difference must be made, particularly if the applicant or recipient may be able to influence the person furnishing the valuation.

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- 4. The date of application that is used in determining which year's average cost of nursing home care to use when determining a penalty period is changed from the date of the individual's first application for Medicaid to the date of the application during which the disqualifying transfer was determined. This will result in a more equitable and fair treatment of those applying, particularly those on the LIS file and more currently, those who are applying under the Affordable Care Act requirements.**

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Penalty Periods 510-05-80-15

1. The number of months and days of ineligibility for an individual shall be equal to the total uncompensated value of all income and assets transferred by the individual, or individual's spouse, on or after the look-back date, divided by the average monthly cost, or daily cost as appropriate, of nursing facility care in North Dakota at the time of the individual's first application during which the disqualifying transfer was determined.

The following example demonstrates how the monthly and daily period of ineligibility is calculated:

Example: Mr. Brown applied for Medicaid on December 10, 2011 and it was determined Mr. Brown made a disqualifying transfer of \$70,000 in November of 2010. The December 2011 application was denied for excess assets.

Mr. Brown reapplied for Medicaid on July 18, 2013. The average cost of nursing facility care at the time the disqualifying transfer was determined (12-2011) is \$6238 per month and \$205.07 per day. \$70,000 divided by \$6238 is 11.22 months. Eleven months at \$6238 per month is \$68618, leaving \$1382 to which the daily rate is applied. \$1382 divided by \$205.07 is 6.73 days. Mr. Brown's penalty period is 11 months and 7 days (partial days are rounded up). The penalty period will start the first of the month in which Mr. Brown is otherwise eligible for Medicaid. If, for example, he requested THMP months and his assets are within the asset limits in April, the penalty period would start April 1, 2013 and run through March 7, 2014.

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5. **A new section is added that addresses payments for services to an Attorney in Fact. With the aging population, we are seeing more and more individuals who have Attorney's in Fact (aka POA's). This section addresses what payments may be allowed.**

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An Attorney in Fact is an agent authorized to act on behalf of another person, but not necessarily authorized to practice law—for example, a person authorized to act by a power of attorney. An attorney in fact is a fiduciary.

Payment for Services to an Attorney-in-Fact 510-05-80-37
(N.D.A.C. Sections 75-02-02.1-43)

When an individual makes a payment to their Attorney-in-Fact for services or assistance furnished to the individual by the Attorney in Fact, the services or assistance furnished may not be treated as consideration for transferred income or assets, unless:

1. There is a valid written contract:

- a. Entered between the individual and the Attorney in Fact prior to the Attorney in Fact rendering the services, and payment is made pursuant to the valid written contract; and
- b. The contract was executed by the individual or the individual's Attorney in Fact who is not a provider of services or assistance under the contract; and

Example: It is acceptable for a Medicaid recipient's Attorney in Fact to sign the contract to have a third party provide the services.

Example: It is not acceptable for a Medicaid recipient's Attorney in Fact to sign the contract to have the Attorney in Fact provide the services.

Example: It is acceptable for a competent Medicaid recipient to sign the contract to have the Attorney in Fact provide the services.

- c. Compensation is reasonable and consistent with rates paid in the open market for the services actually provided; and
- d. The services are necessary and reasonable, or

Example: Mary has had Power of Attorney for both her parents for the past 3 years. Her parents' health has been steadily deteriorating over the past two years. Mary's Mother has always told her children she never wants to go to a nursing facility, so Mary, as outlined in the Power of Attorney agreement, provides round the clock nursing care for her parents for \$2000 per month including her room and board. The worker has verified that both parents need a nursing home level of care and has needed it for at least the past year. Now, Mary's Father has fallen and it is just too much for Mary to care for both parents, so they are applying for nursing care for Mary's Father. We would consider the \$2000 per month plus room and board payments to be reasonable. If the parents had gone directly to long term care, it would have cost them in excess of \$14,000 per month. If they'd have hired a private nurse, it would have cost approximately \$9,000 month.

Reasonableness is dependent upon the type of service provided, whether the service is necessary, the size and scope of the services and what the going rate is in the community for such services.

Example: John has held a Power of Attorney for his father for the past 3 years. John's Dad lost his eyesight and the largest part of his Power of Attorney duties was to pay bills once per month. The agreement had a stated value for these services of \$500 per month. John's Dad at this time had minimal assets, and expenses. Most bills were set up as automatic withdrawals from his bank account. John usually spends 1 hour per month paying his Dad's bills. \$500 per hour for writing checks is not reasonable. If Dad, for example would have several pieces of property in which he had a life estate interest, and was collecting rents, and John was spending 30 – 50 hours per month doing this, it would be reasonable.

2. If there is not a written contract, the prior course of dealings between the individual and Attorney in Fact included the individual paying compensation upon rendering services or assistance, or within 30 days thereafter.

Example: Deb is a 'snowbird' who winters in New Mexico 5 months of the year. There is a history of Deb paying Tim to manage her properties while she is in New Mexico during those months. Deb has been fully capable, so Tim does not conduct everything for her, just intermittently. In such a case, a written contract would not be required as there is an established history of payments made for services. We would require verification of past payments made and for which services.

Reasonable payments are allowed as a spend down of assets but not as a deduction from income.

If you have questions, please contact your Regional Representative.